



April 10, 2003

SUBJECT: PER – How Ethics Rules Apply To Employees
Involved With Competitive Sourcing

TO: Regional Ethics Advisors
State Ethics Advisors

File Code: 360-16-11

This memorandum summarizes certain ethics rules and how they apply to situations involving competitive sourcing that are likely to occur within the Natural Resources Conservation Service (NRCS). We expect to receive further guidance on this issue within the next several weeks from the USDA Office of Ethics and Office of the General Counsel.

As ethics advisors, you need to be familiar with, and understand, the several types of “ethics” rules that may apply to NRCS employees involved in competitive sourcing. To avoid conflicting interests or the appearance of conflicting interests, employees and managers involved with competitive sourcing in a personal and/or official capacity, need to abide by the various ethics restrictions imposed by the (1) Office of Government Ethics (OGE); (2) procurement integrity provisions in the Federal Acquisition Regulations (FAR); and (3) Office of Management and Budget (OMB) Circular A-76, as revised. This summary will focus on certain ethics provisions imposed by OGE and, to a limited extent, the FAR regulations, as they relate to NRCS employees involved in competitive sourcing. The ethics provisions imposed by OMB are of primary importance to those managing the study team process and are, therefore, not included in this summary.

OGE Regulations

OGE’s ethics rules apply to all employees. Employees are responsible for knowing and adhering to the Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR Part 2635), as well as the USDA Supplemental Ethics Regulations (5 CFR Part 8301). As the Agency proceeds with competitive sourcing initiatives, you need to review and understand the following three types of ethics rules and how they apply in situations likely to occur with employees involved in competitive sourcing.

- Prohibition against conflicting interests;¹
- Prohibitions against representation of another to the Federal Government;² and
- Post-employment restrictions.³

¹ 5 CFR Part 2635.402 and 502 (Also, 18 USC 208).

² 18 USC 203 and 205.

³ 18 USC 207.

A further explanation of these OGE rules applicable to all employees and answers to frequently asked questions is attached.⁴ Additionally, you are reminded of the prohibitions against (1) accepting gifts from outside sources, and (2) endorsements and preferential treatment of private persons, organizations, and companies. For more information on these provisions, see 5 CFR Part 2635, Subparts B and G, respectively, and the USDA Ethics Training Modules at <http://www.usda-ethics.net/training/index.htm>.

Procurement Integrity Provisions

FAR regulations add additional restrictions on the activities of procurement officials and former procurement officials involved in competitive sourcing, beyond those imposed on other employees by OGE rules. For example, these include:

- Prohibition against soliciting or receiving gratuities from a competing contractor;
- Prohibition against discussing employment with a competing contractor;
- Prohibition against unauthorized disclosure of proprietary or source selection information; and
- More stringent restrictions on the post-employment activities of procurement officials than a nonprocurement official.

Actually, the term “procurement official” has been replaced by terms such as Program Manager, Source Selection Authority, and Administrative Contracting Officer, to designate those to whom these and other additional ethics restrictions under FAR apply. These are agency officials participating personally and substantially in an agency procurement, as defined at 48 CFR § 3.104. On this point, the OGE has determined that:

“ . . . An employee would not generally become a procurement official solely by participating in management studies or by taking certain action in connection with a procurement conducted under the procedures of OMB Circular A-76. See 48 CFR § 3.104.”

Accordingly, for example, the additional restrictions imposed by FAR regulations apply to members of the Source Selection Board (SSB), but would not generally apply to employees solely because of membership on the Performance Work Statement or Most Efficient Organization teams. For example, if a member of an SSB or other procurement official is working on a procurement of \$100,000 or more and would be considered to be “seeking [outside] employment,” as defined at 5 CFR 2635.601, he must promptly report any contact regarding

⁴ Questions about ethics rules and how they apply to Special Government Employees (SGE’s) should be handled on a case-by-case basis.

outside employment in writing to his supervisor and the Agency Ethics Advisor. He also must either reject the offer or disqualify himself from further participation in the competitive sourcing matter.

Procurement officials are responsible for understanding and adhering to all procurement integrity provisions at Section 27 of the Office of Federal Procurement Policy Act (41 USC § 423) and its implementing regulations at 48 CFR § 3.104. Questions about procurement integrity ethics provisions, including the additional restrictions on post-employment activities, should be directed

to Edward M. Biggers, Jr., Head of the Contracting Activity Designee (HCAD). An employee who is uncertain whether he is among those to whom the additional FAR provisions apply, should also contact the HCAD or their Regional Administrative Officer to request specific guidance on a case-by-case basis.

Whereas an employee may bid or submit a proposal on a Government contract, FAR regulations include a provision that affects whether an employee can win a Government contract:

- FAR regulations prohibit a Government agency from awarding a contract to a Government employee or a business concern or other organization owned or substantially owned or controlled by one or more Government employees except for a most compelling reason.⁵

This is a simplified, limited discussion of complicated rules. The simplification needed to make this user-friendly cannot be used to exempt an ethics advisor [or an employee] from his or her responsibility to properly advise on [and adhere to] all legal and regulatory requirements from all sources. When questions or situations arise, each activity being performed may need to be reviewed with respect to OGE, FAR, and/or OMB ethics rules to get the complete picture on whether any restrictions may apply. Employees are, therefore, encouraged to consult the applicable regulations and seek advice on specific situations, as needed, from their ethics advisor. Ethics advisors must fully research applicable regulations to properly address arising issues.

Further information about the procurement integrity provisions applicable to procurement officials will be provided by the HCAD, under separate cover, on an as needed basis. This would include notice and explanation to any affected procurement officials of the additional post-employment restrictions imposed by FAR regulations on procurement officials handling contracts of \$10 million or more.

The attachment to this memorandum, which includes Answers to Frequently Asked Questions about how OGE ethics rules apply to employees involved in competitive sourcing activities, will

⁵ See 48 C.F.R. § 3.601

be made available on the NRCS Office of Ethics website. It will also be accessible from the new NRCS National Competitive Sourcing website. These websites are easily accessed from

<http://www.nrcs.usda.gov/partners/employees.html>. We will periodically update the Answers to Frequently Asked Questions on the website to provide a ready resource to help you address recurring issues.

Employees are encouraged to direct questions about the OGE ethics regulations to their servicing ethics advisor. I can be reached at (301) 504-2197, if you have questions about this memorandum or need assistance to answer employees' questions about the OGE ethics provisions. Questions about FAR regulations should be directed to Edward M. Biggers, Jr., Head of the Contracting Activity Designee, at (202) 720-4102.

[s]

CARYL J. BUTCHER
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Attachment

cc:

Regional Conservationists
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P. Dwight Holman, Deputy Chief for Management, NRCS, Washington, D.C.

Edward M. Biggers, Jr., Director, Management Services Division, NRCS, Washington, D.C.

Karen Karlinchak, Director, Human Resources Management Division, NRCS, Washington, D.C.

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Kim Kidney, Management Services Division, NRCS, Beltsville, Maryland

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